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No. 88-1899

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEVEN LEVINE,

Petitioner,

v.

CHIEF JUSTICE NATHAN S. HEFFERNAN, JUSTICE SHIRLEY S. ABRAHAMSON, JUSTICE WILLIAM A. BABLITCH, JUSTICE WILLIAM G. CALLOW, JUSTICE LOUIS J. CECI, JUSTICE ROLAND B. DAY, JUSTICE DONALD W. STEINMETZ and STATE BAR OF WISCONSIN and STEPHEN L. SMAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS JUSTICES OF THE WISCONSIN SUPREME COURT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Wisconsin Supreme Court rules requiring membership in the State Bar of Wisconsin as a condition to holding a license to practice law violate First Amendment rights of free speech or association?[1]

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[1]As stated by Mr. Levine, the question presented assumes that the State Bar of Wisconsin ("the State Bar") no longer performs, and that mandatory bar dues no longer finance, the activities which the Court held justified compulsory membership in Lathrop v. Donohue, 367 U.S. 820 (1961). Which activities of the State Bar justified the decision in Lathrop and whether changes in those activities since Lathrop undercut the factual basis for the Court's decision are matters in dispute.

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STATEMENT OF THE CASE

Like his statement of the question presented, Mr. Levine's statement of the case is argumentative. It overemphasizes the importance of the State Bar's educational and attorney discipline activities to this Court's upholding of the constitutionality of the integrated bar in Lathrop v. Donohue and assumes that the State Bar's activities in these areas are sufficiently different from what they were at the time of Lathrop as to undercut the factual basis for that decision. We contend that the State Bar's education and attorney discipline activities were not the sole bases for the Court's decision and that, in any event, those activites are substantially unchanged since the time of the decision.

While the complaint in the present case challenged the integrated bar as a per se violation of the First Amendment, Mr. Levine alternatively contended that if compulsory

State Bar membership were not unconstitutional per se, State Bar dues may properly support only compelling state interests. He asked the district court to appoint a referee or master to determine the percentage of annual State Bar membership dues used for such permissible purposes and asked that any remaining dues monies be rebated to the membership. Brief in Support of Motion for Summary Judgment (Dec. 10, 1986) at 34.

As the district court agreed with Mr. Levine's per se claim, the court did not reach the alternate contention. If this case is remanded to the district court, the court will consider the parties' pending cross-motions for summary judgment regarding the second question.

REASONS FOR DENYING THE PETITION

I. THE DECISION IN LATHROP v. DONOHUE WAS BASED UPON THE "MULTIFACETED CHARACTER" OF THE STATE BAR, RATHER THAN SIMPLY UPON ITS ACTIVITIES IN THE AREA OF EDUCATION AND ATTORNEY DISCIPLINE.

Mr. Levine contends that it was the State Bar's involvement in attorney educational and disciplinary activities which was the Court's sole justification for upholding the integrated bar in Lathrop v. Donohue. We agree with the court of appeals in this case which concluded that "the district court overemphasized the importance of the bar's role in the areas of continuing legal education and attorney discipline to the Lathrop Court." Levine v. Heffernan, 864 F.2d 457, 462 (7th Cir. 1988).

The Lathrop Court concluded that the bulk of State Bar activities serve the function "of elevating the educational and ethical standards of the Bar." Lathrop v. Donohue, 367 U.S. at 843. In the context of

the Court's other conclusions, however, it is apparent that these particular activities were not the sole bases for the Court's holding.

The Court had just completed a comprehensive discussion of all of the State Bar's purposes and activities and stated:

> This examination of the purposes and functions of the State Bar shows its multifaceted character. . . . In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in Railway Employes' Dept. v. Hanson . . . .

Lathrop v. Donohue, 367 U.S. at 842 (empnasis added). Just following the language of the Court found so significant by Mr. Levine and the district court was the following:

> Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any

> impingement upon protected rights of association.

Id. at 843 (emphasis added).

We think that both of these statements, and the Court's lengthy discussion of the full range of State Bar activities, reveal that educational and disciplinary activities were not the only activities which supported integration. If education and attorney discipline were as critical to the Court's holding as Mr. Levine and the district court considered them, the Court's opinion would have more extensively discussed those areas than it did.

Initially, the Court simply summarized the State Bar rules in these respects. Lathrop v. Donohue, 367 U.S. at 829-31. The Court then quoted the Wisconsin Supreme Court's statement in its opinion in Lathrop about the importance of postgraduate legal education, id. at 839, and repeated the Wisconsin court's finding "that the State

Bar's participation in the handling of grievances improved the efficiency and effectiveness of this work." Id. at 839-40. The Court, in footnotes, also described the State Bar's activities in the areas of education and attorney discipline. Lathrop v. Donohue, 367 U.S. at 839 n.10, 840 n.11.[2]

These statements are the extent of the Court's discussion of education and disciplinary activities and are no more prominent than the Court's discussion of the many other activities of the State Bar. Therefore, Mr. Levine and the district court err in concluding that, in the judgment of the Court, the nature and extent of the State Bar's education and attorney discipline activities were essential to the constitutionality of the integrated bar.

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[2]The Court largely quoted or paraphrased from articles in the Wisconsin Bar Bulletin.

II. THE STATE BAR'S ACTIVITIES IN THE AREAS OF ATTORNEY EDUCATION AND DISCIPLINE HAVE NOT SIGNIFICANTLY CHANGED SINCE LATHROP v. DONOHUE.

Even if attorney education and disciplinary activities were as central to the Court's holding in Lathrop v. Donohue as Mr. Levine claims, those activities have not so changed since the time of that decision as to weaken the force thereof.

With respect to education, the State Bar is as heavily involved now as it was at the time of Lathrop. As at the time of Lathrop, the State Bar is required by the Wisconsin Supreme Court to maintain a committee on postgraduate education. The committee must formulate and promote programs for the advancement of "professional knowledge, training and skill, through publications, lectures, discussions and through correspondence course study, and by use of all available media." State Bar By-Law art. IV, sec. 3, Wisconsin Supreme

Court Rules ("Wis. SCR") chapter 10 (appendix), West, Wisconsin Court Rules and Procedure (1987) ("Wis. Rules Pamphlet") at 560. The language of this by-law is virtually identical to the text reviewed in Lathrop. Lathrop v. Donohue, 367 U.S. at 829 n.7. In compliance with this by-law the State Bar operates a major program of continuing legal education activities, through courses, conventions and other meetings, the Wisconsin Lawyer (formerly the Wisconsin Bar Bulletin) and other publications and through other activities.

The district court observed that since Lathrop the Wisconsin Supreme Court had created the Board of Attorneys Professional Competence ("BAPC"). Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478, 1493 (W.D. Wis. 1988).[3] But BAPC only

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[3]In 1976, the court established a system of mandatory continuing legal educa-
(continued...)

administers the Wisconsin court's continuing legal education requirement, see Wis. SCR, chapter 31, Wis. Rules Pamphlet at 753, et seq.; it conducts no training itself. It is the State Bar which carries out the court's direction "to conduct a program of continuing legal education . . . ." Wis. SCR 10.02(2), Wis. Rules Pamphlet at 543.[4]

With respect to attorney discipline, the State Bar continues to play a major role in Wisconsin's overall professional responsibility system.

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[3](...continued)
tion, to be administered by a State Board of Continuing Legal Education within the State Bar. In the Matter of a Supreme Court Rule Requiring Continuing Legal Education of Members of the Wisconsin Bar, 71 Wis. 2d xix, xx (1976). Later in the year, the court created BAPC to function in place of the State Board of Continuing Legal Education. In re Regulation of the Bar of Wisconsin, 74 Wis. 2d ix, x (1976).

[4]The State Bar is a major provider of continuing legal education courses but is not the sole provider. Moreover, the State Bar's ATS-CLE division is funded separately from membership dues.

At the time of Lathrop v. Donohue, the state was divided into nine districts, each with a separate committee appointed by the State Bar. State Bar Rule 10, Integration of the Bar, 273 Wis. xi, xx (1956). The committees investigated allegations of attorney misconduct and could adjust grievances informally. Lathrop v. Donohue, 10 Wis. 2d 230, 250, 102 N.W.2d 404, 414-15 (1960). If an investigation warranted it, the committees were required to file a report with the Board of State Bar Commissioners. State Bar Rule 10, 273 Wis. at xxii.

The Board of State Bar Commissioners was the official state agency charged with formally pursuing allegations of attorney misconduct. Wis. Stats. sec. 256.28 (1955). The members of the board were appointed by the Wisconsin Supreme Court. With the assistance of court-appointed counsel and subpoena power, the board investigated

grievances and litigated charges before court-appointed referees. The referee's report, including findings and recommendations, was filed with the court, which then proceeded to hear arguments and render judgment. Id.

Neither the State Bar nor the Board of State Bar Commissioners was authorized to impose discipline upon an attorney. As the court stated in its opinion permanently integrating the bar:

> The integrated bar has no power to discipline or to disbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, Stats. [dealing with the Board of State Bar Commissioners], for filing complaints for discipline or disbarment in this court is unaffected by . . . [the State Bar] rules.

In re Integration of Bar, 5 Wis. 2d 618, 624, 93 N.W.2d 601, 604 (1958). And in its discussion in Lathrop of the State Bar's role with respect to attorney discipline, the Court stated: "[T]he supreme court has

delegated none of its power to punish disciplinary infractions . . . ." Lathrop v. Donohue, 10 Wis. 2d at 250, 102 N.W.2d at 414.[5]

Under present Wis. SCR 21.08, the State Bar is still required by the court to divide the state into districts and to appoint a "professional responsibility committee" for each district. The duties of the professional responsibility committees are as follows:

> (a) Investigate possible misconduct or medical incapacity of an attorney upon its own initiative or if requested by the administrator.
>
> (b) Report immediately to the administrator any possible misconduct or medical incapacity of an attorney.

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[5]The court of appeals in the present case stated that at the time of Lathrop v. Donohue, attorney discipline "was under the exclusive aegis of the [State Bar]." Levine v. Heffernan, 864 F.2d at 459. The court's overlooking of the Board of State Bar Commissioners is inexplicable.

> (c) Attempt to resolve a dispute between an attorney and a client or other attorney if the dispute does not involve misconduct or medical incapacity if the complainant agrees to the procedure.
>
> (d) Report to the professional responsibility administrator each dispute resolved under par. (c) or unresolved within 30 days of knowledge of the dispute.
>
> (e) Make a recommendation, if the committee considers it appropriate, to the administrator or the board as to the disposition of any matter the committee has investigated.

Wis. Rules Pamphlet at 731. The "Administrator" and the "board" referred to are the Professional Responsibility Administrator (the "Administrator") and the Board of Attorneys Professional Responsibility ("BAPR"). Wis. SCR 21.01 and 21.02, Wis. Rules Pamphlet at 727-28.

BAPR is charged with assisting the court in supervising the practice of law and protecting the public from attorney misconduct. Wis. SCR, chapter 21

(Preamble), Wis. Rules Pamphlet at 727. BAPR replaced the Board of State Bar Commissioners as the court's disciplinary arm in 1976. In re Regulation of the Bar of Wisconsin, 74 Wis. 2d ix, xi (1976).[6] The State Bar's professional responsibility committees do not function independently; they are under the direct control of the Administrator of BAPR. Wis. SCR 21.08(2), Wis. Rules Pamphlet at 731, who must "[s]upervise and coordinate" their activities. Wis. SCR 21.02(3), Wis. Rules Pamphlet at 728.

The committees are also regulated by Wis. SCR chapter 22, BAPR's procedural rules. Under those rules, the BAPR

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[6]State Bar dues did not support the Board of State Bar Commissioners; the board was funded from general state revenues. Lathrop v. Donohue, 10 Wis. 2d at 250, 102 N.W.2d 414-15. Likewise, State Bar dues do not support BAPR; BAPR is funded from separate court assessments upon licensed attorneys.

Administrator may refer any matter under BAPR's jurisdiction to a committee for investigation. Wis. SCR 22.05(3), Wis. Rules Pamphlet at 738.[7] The Administrator is also authorized "to utilize a committee to resolve or adjust" disputes between a client and an attorney or between two attorneys in cases other than misconduct and medical incapacity. Wis. SCR 22.05(4), Wis. Rules Pamphlet at 738.

The importance of the State Bar's professional responsibility committees to BAPR and to Wisconsin's overall professional responsibility system was emphasized in a recent annual report of BAPR, which characterized the committees as "an integral

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[7]BAPR's jurisdiction includes misconduct (as defined in Wis. SCR 20.84, Wis. Rules Pamphlet at 725), medical incapacity and investigations (at the request of the court or BAPC) into the moral character of persons seeking admission to the practice of law. Wis. SCR 21.01(4)(e) and 21.02(1), Wis. Rules Pamphlet at 728.

part of the administrator's investigation program" and which praised the committees' efforts as "essential to the vital work of this board." Sternberg, 1986-87 Annual Report, Board of Attorneys Professional Responsibility, Wis. B. Bull., November, 1987 at 24-25.[8]

Thus, the State Bar continues to be substantially involved in education and

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[8]The report also explained BAPR's rationale for utilization of the State Bar professional responsibility committees:

> This ensures both attorney and public input locally in the grievance process. These district committees afford citizens the opportunity to review their grievances without traveling undue distances and incurring additional expense. Public confidence in the attorney-grievance program has been very much enhanced by including nonlawyer members to these district panels. All grievance reports and recommendations of committees must be reviewed by the administrator and by the board, which is vested with the authority to act.

Id. at 25.

attorney discipline. To be sure, these activities are not identical to the activities reviewed in Lathrop v. Donohue.[9]

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[9]The role of the district committees, for example, has changed in different ways throughout the years (with debatable significance to the constitutional questions before this Court). The rules in effect at the time of Lathrop gave the committees the power to dismiss a complaint. State Bar Rule 10, section 3, 273 Wis. at xxii. The committees' role increased in 1971. The grievance committees were required to report to the State Bar Executive Committee the results of their investigations. Id. The executive committee was permitted to (1) dismiss the grievance; (2) have the president of the State Bar write a letter of admonishment; (3) refer the matter to the State Board of Bar Commissioners without recommendation; or (4) authorize commencement of a disciplinary proceeding in the Wisconsin Supreme Court. In the Matter of Amendment of Rules of State Bar of Wisconsin, 53 Wis. 2d vii (1972). Because of the duplication of effort in jurisdiction between the State Bar and the Board of State Bar Commissioners, this system was altered in 1976 by creation of BAPC and BAPR. See Wilkie, The Role of the Supreme Court in Regulating the Ethics of Lawyers and Judges, Wis. B. Bull., February, 1976 at 23-25. As before 1971, the principal role of the State Bar presently is through its district committees and their function of assisting in investigation and attempting to resolve disputes, although their expenses are defrayed by separate funds. Wis. SCR 21.08.

They are similar enough, however, to require adherence to Lathrop v. Donohue.

III. IT IS UNNECESSARY FOR THE COURT TO REVIEW LATHROP v. DONOHUE.

As Mr. Levine points out in his petition (at 21-23), Lathrop v. Donohue has often been applied by state and federal courts considering integrated bar challenges. But rather than providing a reason for reconsideration of Lathrop, this history supports withholding review. The only court to question the vitality of Lathrop v. Donohue is the district court in the present litigation and it was reversed by the court of appeals. There is now uniformity in the courts' application of Lathrop v. Donohue and, thus, no reason for this Court to grant the petition.

IV. MR. LEVINE MIGHT PREVAIL ON HIS ALTERNATIVE CLAIM, MAKING REVIEW OF LATHROP v. DONOHUE UNNECESSARY.

When this case is remanded, the district court will consider Mr. Levine's contention that assuming the constitutionality of the integrated bar, State Bar dues may not be used to finance the full range of activities now financed.[10] If Mr. Levine does not prevail on his alternative claim, he will once again have an opportunity to petition this Court for a review of Lathrop (as well as for a review of the district court's and court of appeals' treatment of Wisconsin's dues rebate rule). Therefore, it is unnecessary to grant review at the present time.

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[10]The Wisconsin Supreme Court has in place a dues rebate rule for members who choose not to support the State Bar's legislative activities. Wis. SCR 10.03(5). Mr. Levine challenges the adequacy of the rule.

CONCLUSION

The court's determination in Lathrop v. Donohue that the integrated bar is constitutional did not hinge solely on the State Bar's activities in the areas of attorney education and discipline. In any event, at the present time the State Bar's activities in these areas so resemble the activities reviewed by the Court in Lathrop, that Lathrop, to the extent it did hinge on the State Bar's activities in the areas of education and discipline, is nevertheless good law because of the similarity between the State Bar's activities in these areas at the time of Lathrop and at the present time.

It is unnecessary to even consider the question here presented given the uniformity of application of the Lathrop holding throughout all state and federal courts and the existence of Mr. Levine's dues rebate

claim. Therefore, the petition for writ of certiorari should be denied.

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